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The events of the depression and the fear of inflation have precipitated efforts to make more flexible the provisions of trust instruments and of statutes restrictive of trust investments.[1] Where the settlor or the law has left the trustee relatively free, the wise investment of trust funds depends even more upon the ability to cope successfully with controlling economic forces. Nevertheless, both the investment expert and the only occasionally concerned lawyer and judge must contend with trust investments in an arena shaped by the law. What of the law of trust investments in North Carolina?

GENERAL CONSIDERATIONS

Ordinarily, a trustee has the duty, not only to preserve the corpus, but to make it productive.[2] Which of these objects is to receive primary

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[1] The depression brought a multitude of problems to acting trustees, especially those who were confined within narrow investment limits by the directions of the settlor. See Leach, *Lessons from the Depression in the Drafting of Wills and Trusts* (1933) 18 MINN. L. REV. 27; Baker, *The Growing Complexity of Fiduciary Investing* (1933) 56 TRUST COMPANIES 11.

That trustees are concerned about the possibility of inflation is evident from (1933) 57 TRUST COMPANIES 620, and Benner, *Effect of Inflation Program on Life Insurance and Fiduciary Investments* (1933) 56 TRUST COMPANIES 529. See also *In re* Muller's Will, 280 N. Y. Supp. 345 (Surr. Ct. 1935) where testamentary trustees, who were limited to "legals," petitioned the court for permission to invest 35% of a trust fund of $400,000 in common stocks as a hedge against inflation. Petition denied.

A view of recent legislative trends is to be found in Legis. (1934) 19 IOWA L. REV. 354. The law of other jurisdictions is outlined in 3 BOGERT, TRUSTS AND TRUSTEES (1935) §615 *et seq.*; MCKINNEY, TRUST INVESTMENTS (2d ed. 1927) 45 *et seq.*; LORING, TRUSTEE'S HANDBOOK (4th ed. 1928) 143 *et seq.*

[2] See Gary v. Cannon, 38 N. C. 64, 69 (1843); Green v. Rountree, 88 N. C. 164, 166 (1883); Wilson v. Lineberger, 88 N. C. 416, 431 (1883); Sheets v. Tobacco Co., 195 N. C. 149, 153, 141 S. E. 355, 357 (1928); 3 BOGERT, *op. cit. supra* note 1, §611; MCKINNEY, *op. cit. supra* note 1, at 20; LORING, *op. cit. supra* note 1, at 132; 1 RESTATEMENT, TRUSTS (1935) §§176, 181.

A natural corollary of this duty is the liability for interest if he fails to perform his duty, or for the income which the estate reasonably should have produced (in the case of land, *etc.*). Branch v. Arrington, 4 N. C. 230 (1815); Ryan v. Blount, 16 N. C. 382 (1830); Finch v. Ragland, 17 N. C. 137 (1831); Hodge v. Hawkins, 21 N. C. 564 (1837); Peyton v. Smith, 22 N. C. 325 (1839); Spruill v. Cannon, 22 N. C. 400 (1839); Ford v. Vandyke, 33 N. C. 227 (1850); Spack v. Long, 36 N. C. 426 (1841); see Gary v. Cannon, 38 N. C. 64, 69 (1843); *cf.* Chambers v. Kerns, 59 N. C. 280 (1862). Also Suddereth v. McCombs, 65 N. C. 186 (1871); Johnston v. Haynes, 68 N. C. 509 (1873); McNeill v. Hodges, 83 N. C. 505 (1880); Pickens v. Miller, 83 N. C. 544 (1880); Wilson v. Lineberger, 88 N. C. 416 (1883); State *ex rel.* Carr v. Askew, 94 N. C. 194 (1886); Grant v. Reese, 94 N. C. 720 (1886); Smith v. Smith, 101 N. C. 461, 8 S. E. 128 (1888); Coggins v. Flythe, 113 N. C. 103, 18 S. E. 165 (1893); Fisher v. Brown, 135 N. C. 198, 47 S. E. 398 (1904); 3 BOGERT, *op. cit. supra*, §707; MCKINNEY, *loc. cit. supra;* LORING, *loc. cit. supra.*

consideration will depend in each case upon the purposes for which the trust was set up, the size of the fund, the condition of the beneficiaries, and perhaps other circumstances. Every investment which a conscientious trustee makes should reflect an evaluation of those purposes, and represent his best judgment as to how they may be most surely accomplished. In the average case, he will select the security which shows promise of yielding the greatest possible income consistent with the greatest possible safety for the principal.

The field of investments from which the trustee may choose is, in the first instance, defined by the provisions in the instrument from which he derives his authority.[3] The variety of provisions, both permissive and mandatory, which a settlor may make is, of course, unlimited.[4] Under ordinary circumstances, the trustee will be protected if he follows scrupulously the settlor's directions.[5] Situations may arise, however, when the trustee will have, not only the power, but the duty to disregard the terms of the instrument.[6] The greatest problem—and the one with which we are here primarily concerned—arises when the settlor makes no provision covering investments, or when he leaves the whole matter in the trustee's discretion.[7]

It should be recognized, before we get into a discussion of the applicable legal guides and restrictions in this State, that scores of trust investment problems have arisen in other jurisdictions which are not covered by the North Carolina statutes and which have never been presented to our Court for decision. No attempt will be made herein to deal with those problems.

STATUTORY PROVISIONS

Section 4018[8] of the North Carolina Code provides: "Guardians, executors, administrators, and others acting in a fiduciary capacity, . . . may invest in United States bonds, or any securities for which the United States are responsible, farm loan bonds issued by Federal land banks, or in bonds of the state of North Carolina issued since the year

[3] 3 BOGERT, *op. cit. supra* note 1, §681; MCKINNEY, *loc. cit. supra* note 2; LORING, *op. cit. supra* note 1, at 136.

[4] See Hester v. Hester, 16 N. C. 328, 331 (1829) where the Court says: "The creator of the trust may prescribe what rules [for the government of the trustee] he pleases." 3 BOGERT, *loc. cit. supra* note 3.

[5] 3 BOGERT, *loc. cit. supra* note 3; MCKINNEY, *loc. cit. supra* note 2.

[6] See Fisher v. Fisher, 170 N. C. 378, 381, 87 S. E. 113, 115 (1915); Middleton v. Rigsbee, 179 N. C. 437, 102 S. E. 780 (1920); Commercial Nat. Bk. v. Alexander, 188 N. C. 667, 125 S. E. 385 (1924) (not an investment case); Scott, *Deviation from the Terms of a Trust* (1931) 44 HARV. L. REV. 1025; 3 BOGERT, *loc. cit. supra* note 3, and §688.

[7] 3 BOGERT, *op. cit. supra* note 1, §§682-3; MCKINNEY, *loc. cit. supra* note 2; LORING, *loc. cit. supra* note 3; 1 RESTATEMENT, TRUSTS (1935) §227; Note (1926) 26 COL. L. REV. 453.

[8] All references to "sections" are to sections of N. C. CODE (1935).

1872; or in drainage bonds duly issued under the provisions of article 8 of [the] chapter entitled Drainage; . . ." This section further provides that, "in settlements by guardians, executors, administrators, trustees, and others acting in a fiduciary capacity," such securities "shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds or other securities, and may be paid as such by the transfer thereof to the persons entitled." The significance of this cash-equivalent clause will be discussed further on.

Section 4018 (a) authorizes the same classes of fiduciaries to invest "in bonds issued by any county, city, town or school district of the state of North Carolina subsequent to January first, 1915, provided that the net debt of such county, city, town or school district does not exceed ten per cent of the assessed valuation of the property therein subject to taxation for the payment of such bonds." This section also includes a cash-equivalent clause.

Section 4018 (b) permits fiduciaries to invest in "stock of any building and loan association organized and licensed under the laws of this state" if so authorized by the insurance commissioner. No cash-equivalent clause is added. Section 5207 (v) makes bonds of a land mortgage association "a legal investment" for trustees.

Section 220 (a) 1[9] is partially repetitious of Section 4018 in providing that fiduciaries "may" invest in bonds issued, or fully and unconditionally guaranteed as to principal and interest, by the United States. Like Section 4018, this section carries a cash-equivalent clause, with the added provision that such bonds may be paid over to the persons entitled "without any liability for a greater rate of interest than the amount actually accruing from such bonds."

Under Section 6243 (25), fiduciaries "may legally invest" in housing authority bonds "when they are secured by a first pledge of the revenues of, or a first mortgage lien on, property, which pledge or lien does not exceed sixty-six and two-thirds per centum of the value of such property." Section 220 (a) 2 (1) provides that "it shall be lawful" for trustees to invest in "bonds or notes secured by a mortgage or deed of trust insured by the federal housing administrator," in "mortgages or real estate which have been accepted for insurance by the federal housing administrator," and in "obligation[s] of national mortgage associations organized under Title III of the National Housing Act." Subsection (2) permits fiduciaries to "make such loans, secured by real estate, as the federal housing administrator has insured or has made a commitment to insure."[10]

[9] See (1935) 13 N. C. L. Rev. 441.

[10] *Ibid.*

Section 2308 gives guardians the "power"[11] to lend any portion of the estates of their wards "upon bond with sufficient security to be repaid with interest annually," but requires that "all the bonds, notes, or other obligations which he shall take as guardian shall bear compound interest." As will appear later, the Supreme Court has recognized personal security, and mortgages on land or chattels as satisfying the requirements of "sufficient security."[12]

Apparently, the provision requiring compound interest[13] refers only to personal bonds and notes taken under this section. The other statutory provisions to which we have referred, for the most part, specifically include guardians, and the investments there authorized do not bear compound interest.

Numerous other sections will be found scattered through the Code, permitting fiduciaries to invest in various issues of State bonds and notes.[14] These scattered provisions are appended to the acts authorizing the respective issues, for the purpose, no doubt, of increasing the

[11] The section was previously mandatory. REV. CODE (1854) c. 54, §23. See Smith v. Gilmer, 64 N. C. 546, 548 (1870).

[12] Boyett v. Hurst, 54 N. C. 167 (1854) (". . . the security meant is personal security . . ."); State *ex rel.* Whitford v. Foy, 65 N. C. 265 (1871) (". . . we do not think that . . . [personal security] was the only form of security which a guardian could take . . . "—after discussing real property security). The decision in the latter case held a guardian not liable for taking a mortgage on slaves as security.

[13] The requirement ceases with the termination of the guardianship. Wood v. Brownrigg, 14 N. C. 430 (1832) (marriage of female ward); Ryan v. Blount, 16 N. C. 382 (1830) (death of guardian); Mitchell v. Robards, 17 N. C. 478 (1833); State *ex rel.* Carr v. Askew, 94 N. C. 194 (1886) (death of ward).

[14] N. C. CODE (1935) §§3772 (k) (highway bonds and notes); 3846 (qq) 10 (highway bonds and notes); 3846 (qq) 21 (highway bonds and notes); 7343 (industrial school for women bonds); 7343 (z) (industrial farm colony for women bonds and notes); 7431 (refunding bonds); 7432 (i) (general fund notes); 7436 (state hospital bonds); 7439 (state building bonds); 7443 (state debt bonds); 7451 (improvement bonds); 7456 (North Carolina Railroad renewal bonds); 7458 (anticipation notes); 7462 (improvement bonds); 7467 (anticipation notes); 7472 (e) (state institution bonds); 7472 (i) (anticipation notes); 7472 (n) (state institution bonds); 7472 (ff) (funding bonds); 7472 (nn) (funding bonds); 7472 (ww) (special building fund bonds); 7472 (10) (refunding bonds); 7763 (k) (state prison bonds and notes); 5754 (6) (notes for state text book purchase and rental system). The cash-equivalent clause of §4018 also specifically mentions bonds issued under §§3600-3607. See also §7418.

§4018 (c) permits guardians to invest in securities within the classes designated by §§4018 and 4018 (a), registered as to principal only in the name of the ward. See also §4019.

§2174 (1) provides for special proceedings enabling guardians, under certain conditions, to buy in real estate on foreclosure of mortgages or deeds of trust held by them.

Cf. the investment statutes governing banks (§220 (a)-(e)); insurance companies (§6334); fraternal benefit societies (§6512); coöperative non-profit life benefit associations (§6476 (q)); Torren's Law assurance fund (§2422); North Carolina State Thrift Society (§1125 (k)); sinking funds (§§7472 (q) 4-5); credit unions (§§5219-20); building and loan associations (§5182); cemetery funds (§5027); clerks of court (§§962 (a)-(c)). See (1931) 9 N. C. L. REV. 399, and (1935) 13 *id.* 441.

salability of the issue. The language "may invest" and "it shall be lawful to invest" is used indiscriminately. One section[15] is unusual in that it includes the provision that fiduciaries "shall not be liable for any loss which may be incurred by reason of investing therein."

A brief review of the statutes referred to will disclose that they are all permissive in terms. As guides to a doubtful trustee, they therefore serve to suggest limits within which he may safely[16] make a choice. But it will be noticed that the limits suggested are rather narrow. They include the field of bonds issued or guaranteed by the federal government, bonds of this State and its subdivisions, and certain other types of strictly local securities. There is much to be said in favor of restricting trust investments to those of a local character.[17] There is, however, at least one cogent argument in favor of increasing the area of choice. The greater the number from which a choice may be made, the greater the likelihood that the trustee can find the particular type of investment to meet the needs of his particular trust. Of course the argument loses some force in the face of the fact that the statutory classification is not iron-bound. Nevertheless, where trustees are so often unacquainted with the intricate data relating to investments, it is believed that statutory lists, even though only permissive, do, and should have, suggestive weight.

With what degree of safety may a trustee choose from the statutory list? The answer is somewhat uncertain in North Carolina. A *dictum* of the Supreme Court in a recent case suggests that if the investment was made under "statutory authority," there would be no liability for losses resulting therefrom "in the absence of fraud or gross negligence."[18] It is unlikely that the Court would attempt to differentiate between statutory "permission" and statutory "authority." Probably, therefore, all of the statutes referred to constitute statutory "authority," within the Court's meaning. That being so, there remains the question as to what, if any, distinction the Court would make between those sections which include a cash-equivalent clause (or the section containing a seemingly complete immunity from liability) and those which include no such language. Undoubtedly, the cash-equivalent clause was intended to give the trustee a blanket guaranty against liability, for if securities may be distributed at their inventory or cost valuation, there couldn't even be a showing of loss. It is difficult to believe that the

[15] §7472 (ff). See also §7418.

[16] See next paragraph. See also 3 BOGERT, *op. cit. supra* note 1, §614.

[17] See Cobb v. Fountain, *infra (Loans on Mortgage Security)*, and cases discussed in connection with deposits in foreign banks *(Bank Deposits.)* Also McKINNEY, *op. cit. supra* note 1, at 41.

[18] That probably accords with the general rule elsewhere. See 3 BOGERT, *loc. cit. supra* note 16.

Court would refrain from reading the requirements of good faith and due care into even those sections.[19] The safest conclusion would seem to be, therefore, that no significance would be attached to the presence or absence of the cash-equivalent clause, but in all cases, the trustee who had invested in securities designated by statute would be *prima facie* protected, until fraud or gross negligence were shown.

Decided Cases

When the trustee leaves the statute book and turns to the reports of decided cases in search of assistance, he will find very little that is sufficiently definite to point the way. Over a long line of cases, the Court has adhered to the general rule that a trustee must exercise complete good faith and the sound discretion that a prudent man would show in the management of his own affairs.[20] The decision in the most recent case of importance[21] expanded upon the statement, by adding that the investment must represent the trustee's best judgment, arrived at in good faith and after the exercise of due diligence, that it will secure the principal of the fund and yield a reasonable income.

The rule in this State has not undergone the refinements of expression that are to be found in some of the cases elsewhere.[22] The net result is very probably the same. A more precise statement of the standard does not compel a more precise application of it, especially when a court must look backward to determine what a "reasonably prudent business man" would have done with his money or someone else's at a particular time under the then circumstances.

Although a review of the cases may not point out with any certainty what a trustee *may* do, it will indicate perhaps things which he *may not* do, and at the same time illustrate the way in which the general rule has been applied.

[19] So far as has been discovered, the Court has never attempted to graduate the care required in different situations. Whether it would require, in terms at least, a lesser degree of care where the investment appears on the statutory list than where it does not is an unanswered question. If it should do so, it would simply be inviting trouble for itself in applying such a variable standard.

[20] Practically all of the cases hereafter referred to or cited contain statements of the rule. It was early stated by the Court as follows: "In the absence of . . . [a rule prescribed by the settlor], the law enjoins good faith, which includes not only what is commonly understood by honesty and integrity, but care, diligence, and attention, and in matters of judgment and discretion, that they should be carefully applied." Hester v. Hester, 16 N. C. 328 (1829) at 331.

[21] Sheets v. Tobacco Co., 195 N. C. 149, 141 S. E. 355 (1928).

[22] In Sargent, *Evolution of Trust Investment Principles* (1934) 58 Trust Companies 711, the Massachusetts rule is traced through various stages of refinement of expression. There are variations as to whether the trustee should act with the prudence of one handling *his own* money, or of one handling *someone else's* money; and as to whether the trustee shall be judged by the knowledge that he has, or by that which he should reasonably have. See 1 Restatement, Trusts (1935) §227 and comments. (The vagueness of the discussion in the Restatement lends weight to the observation in the text.)

Confederate Securities and Currency:

While this field of trust investments is now ancient history, two purposes can be served by a glance at the cases. (1) The question was presented to the Court so often that the decisions on it probably represent the best rounded branch of trust investment law in the State. It is, therefore, an ideal illustration of the application of the general standard. (2) With the air heavy with inflation talk, the power of a trustee to deal in depreciated currency, and securities payable in such currency, may not be a subject of purely academic interest.

The cases under this heading can be roughly divided into three groups: (1) where a fiduciary accepted Confederate currency on behalf of his estate; (2) where he deliberately avoided accepting such currency; and (3) where he invested in Confederate securities.

1. In *Gibbs v. Gibbs,*[23] a guardian was held liable for accepting payment of a good note in November, 1863, in Confederate currency, then worth only six or eight cents on the dollar.

In *State* ex rel. *Cummings v. Mebane,*[24] a guardian loaned estate funds to a solvent person on good security. In December, 1862, the principal being about to leave the state, the guardian accepted payment in Confederate currency, which he was forced to retain because of inability to reinvest. He was held not liable for accepting it under the circumstances, (but was charged for having mingled it with his personal funds). The Court says:[25]

"It is one thing to sit in judgment upon the past, and quite another to foresee consequences. It will not do to look back now and see how estates might have been better managed, and exact of those who had them in charge that degree of diligence which would have proved most beneficial in each particular case.

"The degree of diligence to which we think they should be held liable is that which a prudent man at that time would have exercised in the management of his own affairs."

In *Shuford v. Ramsoür,*[26] the "agent" for a minor loaned his ward's entire state, in 1858, to a firm of which we was a member, and took the firm note. In April, 1863, while the firm was perfectly solvent, and without any insistence upon the part of the debtor, he accepted payment of the note in Confederate currency. He was surcharged, not having acted as a "prudent man."

The administrator of a guardian at first refused a tender of Confederate currency, made in May, 1863, in payment of a note due his decedent. The debtor insisted that such currency was legal tender, and the administrator recalled having heard that it was an indictable offense

[23] 61 N. C. 471 (1868).
[24] 63 N. C. 315 (1869).
[25] *Id.* at 317.
[26] 63 N. C. 622 (1869).

to refuse to accept it. The decision in *State* ex rel. *Wells v. Sluder*[27] was that he was not justified in later receiving the tendered currency. (The Court may well have been influenced by the further showing that the administrator did not keep the guardian's personal estate separate from that held as fiduciary.)

In *Freeman v. Wilson*,[28] a guardian rented out slaves and land belonging to the estate and received payment in Confederate money. He also accepted payment of sundry notes in such currency. Most of the money so received was used for current expenditures. The Court held him not liable for the exercise of his "honest discretion," and also relieved him from liability for having exchanged the reasonable amount of currency he had on hand for a new issue.

The cases above reviewed are typical of the numerous others presented to the Court following the Civil War.[29] The test applied is the simple

[27] 70 N. C. 55 (1874), *construed in* 72 N. C. 435 (1875).

[28] 74 N. C. 368 (1876).

[29] Compare the following: Donnell v. Donnell, 62 N. C. 148 (1867) (A trustee held a note for $2500, due before the War. In 1863, at a time when the money was not needed, and when both principal and surety were solvent, he accepted payment in Confederate notes and notes of individuals mostly due after 1861. *Held,* liable.); Shipp v. Hettrick, 63 N. C. 329 (1869) (An executor was held not liable for receiving Confederate currency in 1862 and 1863, but was liable for not investing it, and for mingling it with his own moneys.); Hurdle v. Leath, 63 N. C. 597 (1869) (A guardian was liable for receiving "bank notes" "just before the surrender".); Suddereth v. McCombs, 65 N. C. 186 (1871) [*Dicta* (at 188-9) that a guardian was justified in receiving North Carolina Treasury notes in May, 1864, but was not justified in receiving $800 in Confederate currency in 1865.]; State *ex rel.* Whitford v. Foy, 65 N. C. 265 (1871) (A guardian was not liable for having received "bank notes" and Confederate notes prior to 1862, and for having held them, safe investment being impossible.); Jurney v. Cowan, 67 N. C. 393 (1872) (In 1862, during negotiations for surrendering his trust, a trustee liquidated well-secured notes and invested the Confederate currency received in Confederate bonds. *Held,* liable.); Winstead v. Stanfield, 68 N. C. 40 (1873) [A guardian, from December, 1862, to the beginning of 1864, accepted Confederate currency and "bank bills" and mingled them with his own funds. In January, 1864, he sold $150 of the "bank bills" for $412.58 in Confederate currency. In March, he invested $1000 in a Confederate bond. He also loaned out estate funds in his own name and used them in his own business. *Held,* liable for converting the funds at the time received, (and perhaps other grounds).]; Larkins v. Murphy, 71 N. C. 560 (1874) [By *dictum* (at 561), an administrator who accepted part payments of Confederate currency on a well-secured pre-war note during 1863 and 1864, without any need for the money, was liable. But settled by agreement.]; Love v. Johnson, 72 N. C. 415 (1875) [By *dictum* (at 420), had a guardian accepted a tender of Confederate currency, made in the summer or fall of 1863, when it had become so depreciated as to be notice to trustees not to receive it on well-secured pre-war notes, he would have violated his trust.]; State *ex rel.* Lippard v. Roseman, 72 N. C. 427 (1875) (An administrator sold slaves in August, 1863, for Confederate currency, which he mingled with his own, and apparently used in his own business. He made loans in his own name, and kept no account of the share of estate funds used in making the loans. *Held,* liable.); State *ex rel.* Wells v. Sluder, 72 N. C. 435 (1875) [The Court says (at 437): ". . . persons acting in a fiduciary character and receiving Confederate money are to be charged only with its value at the date of the receipt, unless it was received so late in the war as to amount to notice that the *cestui que trust* would not receive it."]; State *ex rel.* Armfield v. Brown, 73 N. C. 81 (1875) (A guardian, in November, 1863, when Confederate currency

one of comparing the fiduciary's conduct with that of "reasonably prudent business men" in handling their *private* affairs, giving due consideration to peculiar circumstances. Just how successful the Court was in putting itself into the shoes of the fiduciary at the particular time, (thereby avoiding the application of the "hindsight" test), will appear more clearly in the next group of cases.

2. In 1861, a guardian recovered judgment against parties who were then solvent and remained so during the War. Rather than collect the

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had depreciated to $15 for $1 in gold, received such currency in payment of his wards' interest in their father's estate. *Held,* liable.); Dockery v. French, 73 N. C. 420 (1875) (In February, 1864, a guardian accepted in payment of a debt of $5820, which was secured by a deed of trust on land and slaves, Confederate currency then worth $227.14. *Held,* liable. The transaction was *prima facie* fraudulent, the Court thought.); Suddereth v. McCombs, 79 N. C. 398 (1878), *reaff'd on rehearing,* 82 N. C. 535 (1880) (Between 1861 and April, 1863, a guardian converted "bank bills," then on a par with gold, and solvent notes into Confederate currency, which he later converted into Confederate certificates of indebtedness. *Held,* the first conversion was wrongful. Pressure of public opinion was no justification.); McNeill v. Hodges, 83 N. C. 505 (1880) (A guardian was not liable for accepting Confederate currency at the end of 1863 and 1864 in payment of rents and hires.); Robertson v. Wall, 85 N. C. 284 (1881) (A guardian converted well-secured prewar bonds into Confederate currency between September, 1861, and July, 1863. Upon finding it impossible to make private loans, and after consulting competent advisors, he invested the estate funds, as well as his own, in Confederate bonds. *Held,* not liable.); Burke v. Turner, 85 N. C. 500 (1881) (A guardian was not liable for receiving Confederate currency in December, 1862, from the administrator of the estate of his ward's father, but was liable for failing to invest it, mingling it with his own, and using it for his own purposes.); Covington v. Lattimore, 88 N. C. 407 (1883) [Executors collected claims due the estate during 1861 and 1862 in Confederate currency, and, not being able to loan it out, invested in Confederate certificates. *Held,* not liable. One executor was a debtor of the testator. He paid the debt to his co-executor in Confederate currency, and, on the same day, received it back as part of the estate. *Held,* liable, even though his good faith was conceded. He knew that he (as debtor) was solvent and the debt secure, and (as executor) had no right to receive Confederate currency which he knew could not be loaned out.]; Summers v. Reynolds, 95 N. C. 404 (1886) [An executor arranged with his business partner to buy certain real estate to be sold by the estate in October, 1863. He made no public announcement of the kind of money that would be accepted, but in answer to private inquiries, stated that the sale would be for good money. An agent of the partnership bid in the property at $3000 Confederate currency (others who had wanted to bid in that kind of money having refrained). *Held,* liable.]; Coggins v. Flythe, 113 N. C. 103, 18 S. E. 96 (1893) [A guardian who rented land and slaves in 1865 for cash (Confederate) was not liable.]; Dunn v. Dunn, 137 N. C. 533, 50 S. E. 212 (1905) (A trustee who failed to keep trust funds separate from his own during the War was not protected by the depreciation of Confederate currency.).

Compare the results of these cases with the rule-of-thumb laid down in Emerson v. Mallett, 62 N. C. 234, 236 (1867): ". . . as a general rule, an officer might have received . . . [Confederate currency] up to 1863, and ought not to have received . . . [it] after 1863, upon ante-war debts; and . . . 1863 is debatable ground."

For cases involving the power of a collecting officer to receive such currency, see Emerson v. Mallett, *supra;* Greenlee v. Suddereth, 65 N. C. 470 (1871); Baird v. Hall, 67 N. C. 230 (1872); Utley v. Young, 68 N. C. 387 (1873); Johnson v. Haynes, 68 N. C. 509 (1873); Purvis v. Jackson, 69 N. C. 474 (1873); Patton v. Farmer, 87 N. C. 337 (1882). The same rule of prudence is applied in these cases.

judgment in Confederate currency and reinvest it, he directed the clerk not to issue execution. After the War, the judgment debtors failed and left the state. The guardian died in 1866, and his estate was not charged.[30] Under the cases in the preceding group, prudent business men were accepting Confederate money, at least during the early years of the War, and the guardian would undoubtedly have been protected had he promptly enforced his judgment. Either some prudent business men *were* accepting Confederate currency, and others equally prudent *were not*, or else the Court is influenced by the "hindsight" realization that the money would have been lost whichever course the guardian chose.

In *Donnell v. Donnell*,[31] a trustee held a bond of *A* and *B*, due in 1858. *A* left the country insolvent in 1861. *B* died insolvent in 1865, having been considered failing for two or three years. The trustee was not charged. The Court said that even though one of the debtors had failed, the more prudent course was to rely upon the other's credit, and not try to collect it in depreciated currency.[32]

3. In *Cobb v. Taylor*,[33] executors received Confederate currency during the years 1861 and 1862, and up to February, 1863. Because communications had been cut off, they were unable to distribute the estate to legatees residing outside the State, and, finding that the currency was depreciating, they invested it in State Treasury notes and Confederate certificates of deposit. They were not held liable. But in *State* ex rel. *Purser v. Simpson*,[34] a guardian who collected well-secured pre-war notes in Confederate currency in September and October, 1863, and bought Confederate bonds at a discount was held liable for the loss. And by *dictum* in *Suddereth v. McCombs*,[35] a guardian was justified in investing Confederate currency in Confederate bonds, certificates of deposit, and State Treasury notes as late as March, 1864.

[30] State *ex rel.* White v. Robinson, 64 N. C. 698 (1870).

[31] 62 N. C. 148 (1867).

[32] Compare the following: Covington v. Leak, 67 N. C. 363 (1872) (A guardian recovered a judgment against administrators in October, 1863. He refused to receive Confederate currency in payment, and did not enforce payment before his death in 1868. The sureties on the administrators' bond remained solvent. *Held,* no negligence.); McNeill v. Hodges, 83 N. C. 505 (1880) (During 1858 and 1859, a guardian accepted notes as payment for the hire of slaves. The makers were land-owners, and, considering the debt secure, the guardian did not try to enforce payment during the War. It was held that he was negligent in failing to obtain security for the debts.); Jennings v. Copeland, 90 N. C. 572 (1884) (A guardian received a note in 1863 from the prior guardian. In holding him not liable for failure to enforce payment before the debtors failed at the end of the War, the Court said it was not the duty of a fiduciary to collect well-secured debts in depreciated currency.).

[33] 64 N. C. 193 (1870).

[34] 65 N. C. 497 (1871).

[35] 65 N. C. 186, 187-8 (1871).

The Court's language in *Green v. Rountree*[36] shows that the same test is applied in these cases:

"No trustee will be held for loss, who acts in good faith and manages his trust funds with that degree of diligence which prudent business men, similarly situated, use in the conduct of their own affairs."

In that case, the trustee invested Confederate currency in Confederate bonds in the spring of 1863. The Court, in holding that he was not liable, suggests that it was his duty to invest the fund in some way, and he could find no other.

In *Pearson v. Caldwell*,[37] a guardian had purchased 6% bonds of the State of North Carolina in 1858. In the latter part of 1862, he exchanged them for 8's. The Court thought that the exchange could not be said "to have been grossly (if at all under the circumstances then existing), imprudent or injudicious."

In *Longmire v. Herndon*,[38] a guardian received $3000 in Confederate currency, in December, 1862, in payment of a well-secured pre-war note, and invested it in Confederate 7-30 bonds. In holding him not liable, the Court points out that prudent business men were doing the same thing, and that the guardian made the same investment of his own funds.[39]

Corporate Stocks:

In *Washington v. Emery*,[40] a testamentary trustee held the unsecured note of one *B* whose credit was generally considered good but who was known as a speculator. The trustee converted the note into sixty shares of Wilmington & Weldon Railroad Company stock. The stock had been paying dividends for many years, at the rate of 7% for several years preceding the investment. The road was an established one, and the trustee consulted competent advisors before making the change. The Court held that he should be credited with the value of the stock on his account. It is difficult to believe that the Court was not influenced by the fact that *B* failed after the change, and that no

[36] 88 N. C. 164, 166 (1883)

[37] 70 N. C. 291 (1874).

[38] 72 N. C. 629 (1875).

[39] In Suddereth v. McCombs, 79 N. C. 398 (1878), the Court says (at 400) that the conversion of Confederate currency into Confederate certificates of indebtedness in 1863 was blameless, for they were equal. See also Robertson v. Wall, 85 N. C. 284 (1881), *supra* note 29; Patton v. Farmer, 87 N. C. 337 (1882), where a clerk had received Confederate currency for the purchase money due on a partition sale, which, after the heirs of the deceased had refused to accept it, he invested in Confederate certificates in 1864; *held*, not liable; Covington v. Lattimore, 88 N. C. 407 (1883), *supra* note 29; Grant v. Reese, 94 N. C. 720 (1886) where an administrator was charged with the reasonable hire of slaves (in Confederate currency) for the years 1863 and 1864, in the absence of evidence where he actually rented them out.

[40] 57 N. C. 32 (1858).

loss was shown as a result of the change. The opinion expressly states that the fact that the trustee was personally interested in the trust fund raised "a presumption that . . . [he] was doing what he believed to be for the best."

In *Sheets v. Tobacco Co.*,[41] probably the leading case in this State on the subject of trust investments, a guardian invested $9,000 in the preferred stock of the tobacco company. The stock depreciated, and the wards sued the company for the $9,000, plus interest, less dividends paid. A judgment for the plaintiffs was reversed and a new trial ordered, because of the trial court's refusal to submit defendant's issues as to the good faith and diligence of the guardian in making the investment. The Court says[42] that if there is any liability, it is primarily that of the guardian. The opinion quotes with approval the Massachusetts rule,[43] and states:[44]

> "A guardian is generally authorized to make any investment of funds in his hands, belonging to his ward, which, in his best judgment, arrived at in good faith and after the exercise of due diligence, will secure the principle of said fund, and yield a reasonable income therefrom for the benefit of his ward's estate."

The clarity of this expression of the rule is somewhat impaired by an immediately preceding statement:

> "The fact that he has made an investment . . . which he was authorized to make, does not relieve him of liability for losses sustained by reason of such investment, if in making the particular investment he failed to act in good faith and with due diligence."

The two expressions, taken together, seem to involve some circuity. But they do leave unimpaired the requirements of good faith and due diligence to which the Court has adhered since its earliest decisions.[45]

Loans on Personal Security:

In *Boyett v. Hurst*,[46] a guardian loaned money to a partnership, taking notes signed by both partners. He was held liable. The Court

[41] 195 N. C. 149, 141 S. E. 355 (1928). [42] *Id.* at 154, 141 S. E. at 358.

[43] As classically stated in Harvard College v. Amory, 26 Mass. 446: "He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." [44] *Id.* at 152, 141 S. E. at 357.

[45] *Cf.* Troy v. Troy, 45 N. C. 85 (1852) where the Court speaks (at 87) of the power of equity courts to decree the sale of lands held in trust in a proper case, and to direct the reinvestment of the proceeds in other lands or "perhaps" in "stocks." Later cases throw no light upon this statement, and it is a question as to how seriously it should be taken. See also Tayloe v. Tayloe, 108 N. C. 69, 12 S. E. 836 (1891), *infra (General Considerations in Managing the Estate)*.

For a broad investment provision by the settlor, under which the trustee apparently retained stocks, see Commercial Nat. Bk. v. Alexander, 188 N. C. 667, 125 S. E. 385 (1924). [46] 54 N. C. 167 (1854).

construed the statutory requirement of "good and sufficient security" (under the then form of Section 2308) as requiring that the investment be secured by the obligation of some person *in addition to* the borrower. In this decision, the Court also intimates that, where the guardian rented lands and negroes belonging to the estate to his ward for the last three years of the ward's minority, and took the latter's notes for the rents, he was liable. This case should be compared with *Watson v. Holton,*[47] where a guardian loaned estate funds, taking *A*'s bond with *B* as surety. *A* and *B* were partners, but each had property other than the partnership property. Both failed, and the guardian was relieved of liability. The Court found that the requirement laid down in *Boyett v. Hurst* had been met.

In *Nelson v. Hall,*[48] the executor was directed by the will to keep a certain fund "at interest in good bonds to my executor for the education and support of all my children." He took two notes for $1806.79 and $659 respectively from *A, B* and *C,* and a note of $50 on which *D* was principal and *E* surety. All the parties failed suddenly. The Court found no want of care on the part of the executor, and stated:[49]

"Executors should not be held responsible as insurers; all that a sound public policy requires is that they shall act in good faith and use ordinary care."

A guardian, in *Hurdle v. Leath,*[50] loaned $2435 on the bill single of *A,* with *B* as surety. The loan was made in 1860. In 1866, he procured three more sureties. Upon his accounting, the guardian tried to make it appear that all four of the sureties were original parties, and examined his witnesses as to their solvency in 1860. He was held liable. His procuring the other three sureties in 1866 was thought to be evidence that he knew the security was insufficient, and of his negligence in not taking immediate steps to collect the debt.[51]

The same guardian loaned $2135 on the bill single of *X,* with *Y* as surety. *X*'s credit was good; *Y*'s, "doubtful." It was held that *Y*'s obligation was not "sufficient security" within the statute.

In *Camp v. Smith,*[52] an executor received a $3000 bond of *P,* with *S*

[47] 115 N. C. 36, 20 S. E. 611 (1894). [48] 58 N. C. 32 (1859).
[49] *Id.* at 34. [50] 63 N. C. 597 (1869).
[51] The old form of §2308 (Rev. Code (1854) c. 54, §23) contained a requirement that "when the debtor or his sureties are likely to become insolvent, the guardian shall use all lawful means to enforce payment thereof, on pain of being liable for the same." For decisions under this provision, see, for example, Williamson v. Williams, 59 N. C. 62 (1860); Hurdle v. Leath, *supra;* McNeill v. Hodges, 83 N. C. 505 (1880).
For cases involving delay in collection by fiduciaries other than guardians, see, for example, Davis v. Marcum, 57 N. C. 189 (1858), and Jennings v. Copeland, 90 N. C. 572 (1884).
[52] 68 N. C. 537 (1873).

as surety, as part of the estate of his decedent. He procured a renewal bond of the same parties, running to him in his fiduciary capacity. Five years later, *P* was insolvent, and *S* in good standing. At the latter's request, the executor surrendered the bond in return for *S*'s individual bond. He was held liable.

In *Freeman v. Wilson,*[53] a guardian received from the estate of his ward's father, two notes, each signed by three makers, all of large means. However, their property consisted mostly of slaves, and they owed more than the value of their lands. In December, 1862, the guardian exchanged these two notes for the note of *F,* payable to him as guardian, with *F*'s son as surety. *F* was wealthy; his son was not. In holding the guardian not liable, the Court remarks that, even though the son was not a "good" security, the exchange "was not only honest, but seems to have been fortunate." The decision would seem to involve a good bit of the "hindsight" standard.

In the same case, the guardian, finding that part of the estate consisted of the note of *A,* without security, procured a note from *A* running to himself as guardian. *A* was a man of large means. The guardian was held liable for failure to obtain "sufficient security."

In *Coggins v. Flythe,*[54] a guardian rented land to *A* in 1873, and took *A*'s note for the rent, with *B* and *C* as sureties. The note was due January 1, 1874. At the time the note was executed, *B* and *C* were reputed to be solvent, but large judgments had been docketed against *C* during 1872 and 1873. In 1872, and again in 1875, the guardian had found it necessary to sue the same parties on other obligations. He held the note for more than two years after its maturity before suing, and was surcharged for want of ordinary care in the management of the estate.

A survey of these cases would seem to indicate that, while a guardian is expressly required by statute to obtain "sufficient security" on personal loans, the same requirement applies to other types of fiduciaries as part of "ordinary prudence." Certainly that is the safest course for a trustee to pursue if he lends estate funds out on individual notes.

Loans on Mortgage Security:

Prior to the Civil War, a guardian took a note, secured by a mortgage on three slaves, worth considerably more than the amount of the debt. According to *State* ex rel. *Whitford v. Foy,*[55] that constituted "sufficient security" within the meaning of the statute.

In *State* ex rel. *Torrence v. Davidson,*[56] an administrator, (who was also a distributee), received as part of the estate four notes of one *G.*

[53] 74 N. C. 368 (1876).
[54] 113 N. C. 103, 18 S. E. 96 (1893).
[55] 65 N. C. 265 (1871).
[56] 92 N. C. 437 (1885).

Knowing that *G* was heavily indebted, the administrator sought to effect a settlement, and, after repeated efforts, secured a mortgage on certain land, then of ample value, in consideration of an additional loan and an extension of time. The property declined in value and the administrator, expecting improvement, delayed foreclosure. He finally foreclosed and bought in the land. The Court felt that he had acted with good faith and reasonable diligence.

In *Syme v. Badger*,[57] an executrix received as part of the estate a note of *M*, with sureties. Considering the debt unsafe, she required *M* to execute a new note, with other sureties (*I* and *T*). She later sued on the new note and recovered judgment. In exchange for the judgment, she accepted a note, secured by a mortgage on the lands of *I* and *T*. Later, *I* substituted a new mortgage on lands of greater value. The note and mortgages were taken in the name of the executrix as an individual. She believed the mortgages to be ample security, and delayed foreclosure under the mistaken belief that she was entitled to the whole debt as distributee. After her death, her administrator foreclosed. The Court held that her estate was not liable for the loss. She had exercised good faith and due diligence, and, since she had believed that she was dealing with her own property, she had not converted the funds by taking the note and mortgages in her individual name.[58]

In *McEachern v. Stewart*,[59] a clerk of court, who was directed to invest in real estate or United States bonds, loaned money to his brother and took a third mortgage on land, on which he, individually, held a second mortgage. Both the first and second mortgages were long overdue, and no payments of principal or interest had ever been made on them. The loan was applied in reduction of the first mortgage. Neither the court nor the beneficiaries were informed of the nature of the investment. The clerk was held liable, and the third mortgage decreed to be a charge on the land (which the clerk had bought in through an

[57] 92 N. C. 706 (1885).

[58] This case is probably unique in this State in holding no *"devastavit"* where the fiduciary took securities in his own name individually. The Court explains the particular hardship of the situation in Syme v. Badger, 96 N. C. 197, 205, 2 S. E. 61, 64 (1887). In this respect the case illustrates that even strict rules will be waived by the courts where the facts are particularly appealing.

Cf. State *ex rel.* Whitford v. Foy, 65 N. C. 265 (1871) (A guardian failed to have notes received from the estate of his ward's father transferred into his name as guardian. *Held,* no conversion.); Jennings v. Copeland, 90 N. C. 572 (1884) (A guardian purchased a note and took an assignment in his individual capacity. *Held,* conversion.); Ogburn v. Wilson, 93 N. C. 115 (1885); Summers v. Reynolds, 95 N. C. 404 (1886) (An executor deposited estate funds in a bank and took certificates of deposit in his own name. *Held,* conversion.); also Younce v. McBride, 68 N. C. 532 (1873); Winborne v. White, 69 N. C. 253, 262 (1873); and Beam v. Froneberger, 75 N. C. 540 (1876) (cases involving conveyances of land to a trustee individually).

[59] 114 N. C. 370, 19 S. E. 702 (1894).

agent on foreclosure). The opinion states that "trust funds must be managed exclusively in the interest of the beneficiary, and cannot be employed so as to work a benefit or profit to the trustee."

Cobb v. Fountain[60] is the only case found in the reports dealing with a mortgage on foreign realty. The complaint alleged that defendant guardian had loaned $2400 to a South Carolina resident; that he took a mortgage on South Carolina realty as security; that he never had reported the investment to the court; and that the note was overdue. The guardian demurred on the ground that there was no allegation of want of good faith and due diligence. The demurrer was held to have been properly overruled. The Court said:[61]

"As it is more prudent for a guardian to invest trust funds in his own State, where they may be kept under his immediate observation and within the jurisdiction of the domestic courts, we think the investment of his ward's money in securities which are beyond the jurisdiction should be disapproved unless made under rare and exceptional circumstances."

And again:[62]

"While not disposed to hold that a guardian may never invest his ward's funds beyond the jurisdiction of the domestic courts, we are of [the] opinion that such investment is *prima facie* improper and that upon proof thereof it is incumbent upon him, at the risk of an adverse verdict if he fail, to proceed with evidence tending to show that he has faithfully performed the duties imposed by his trust."[63]

Investment in a Business:

In *Fisher v. Fisher*,[64] the decedent's estate was found to be so embarrassed by debts and liens that it was considered necessary to place it under the control of competent business management. A receiver was appointed by the court, and directed to invest $50,000 in a modern business building. He actually expended approximately $60,000, but reported to the court periodically as the building progressed and had his reports approved. He was held not to be liable to surcharge, the Court reciting the rule with which we are now familiar.

The receiver also invested $8,000 in a bank of which he was president. He did so by order of the court and with the approval of the life beneficiary. In holding him not liable, the Court admitted that "the

[60] 187 N. C. 335, 121 S. E. 614 (1924).

[61] *Id.* at 338, 121 S. E. at 615. [62] *Id.* at 339, 121 S. E. at 616.

[63] The Court has adopted the general rule elsewhere. 3 BOGERT, *op. cit. supra* note 1, §673; MCKINNEY, *op. cit. supra* note 1, at 41; LORING, *op. cit. supra* note 1, at 141, 250.

Isler v. Brock, 134 N. C. 428, 46 S. E. 951 (1904) contains a court order directing a trustee to invest in first mortgages on land.

[64] 170 N. C. 378, 87 S. E. 113 (1915).

rule undoubtedly is that a trustee is not allowed of his own will to invest a trust fund in his own individual enterprise."[65]

In *North Carolina R. R. Co. v. Wilson*,[66] the railroad company, to secure its bonds, conveyed all its property to a trustee. The trustee was directed to deposit sinking funds in a designated bank or in "some other depository which shall be, in his judgment, safe." He was also given the discretion to invest such funds in securities recommended to him by the president or directors of the company. Without any prior authorization from the president or directors of the company, the trustee deposited $40,000 with a banking firm of which he was senior partner, and selected certain notes held by the firm as collateral. Later, when the firm became embarrassed, he refrained from withdrawing the funds for fear of further embarrassing it. In holding him liable for breach of trust, the Court announced that "trust funds must be managed exclusively in the interest of the beneficiary, and can not be appropriated to the use of the trustee, or of any firm of which he is a member, or in which he has a contingent interest."[67]

In *Costner v. Piedmont Cotton Mills Co.*,[68] a trustee in bankruptcy loaned trust funds to the cotton company, of which he was secretary, treasurer, and a director. Upon the failure of the company, he sought to have his claim allowed as a preference. It was denied, the Court indicating that the investment was wrongful.

Bank Deposits:

According to the decision in *Summers v. Reynolds*,[69] an executor who deposits estate funds in a bank and takes certificates in his own name, individually, is guilty of converting the funds. The Court further intimates that the same is true, even when he opens an account in his own name, but deposits only trust funds.[70]

That the same rule of good faith and reasonable diligence applies to deposits of trust funds in banks is apparent from the decision in *Pierce v. Pierce*.[71] There a guardian deposited funds of his ward in a bank,

[65] *Cf.* Peyton v. Smith, 22 N. C. 325 (1839); Shuford v. Ramsour, 63 N. C. 622 (1869); Winstead v. Stanfield, 68 N. C. 40 (1873); Ogburn v. Wilcox, 93 N. C. 115 (1885); State *ex rel.* Carr v. Askew, 94 N. C. 194 (1886); Fisher v. Brown, 135 N. C. 198, 47 S. E. 398 (1904).

[66] 81 N. C. 223 (1879).

[67] *Cf.* cases cited note 65.

[68] 155 N. C. 128, 71 S. E. 85 (1911).

[69] 95 N. C. 404 (1886).

[70] In Shipp v. Hettrick, 63 N. C. 329 (1869), the Court said (at 331) that, if the executor (who had mingled estate funds with his own) had made a general deposit of estate moneys in a bank in his own name, it could not have relieved him; but otherwise, if he had made a special deposit. Again in State *ex rel.* Lippard v. Roseman, 72 N. C. 427 (1875), the Court said (at 429) that a guardian (who had mingled estate funds with his own) was in no better position than as if he had made a general deposit of the money in a bank in his own name. *Cf.* Peyton v. Smith, 22 N. C. 325 (1839); cases cited note 58.

[71] 197 N. C. 348, 148 S. E. 438 (1929).

and his account, showing the deposit, was approved by the clerk. In a suit against the guardian and his sureties by the wards, the judgment was reversed and a new trial awarded because of the trial court's failure to submit the issues of good faith and due care. The Court seems to overlook the point that was raised in *State* ex rel. *Collins v. Gooch*[72] where a deposit by a guardian in a Virginia bank was held wrongful on two grounds: (1) that the bank deposit does not comply with the statutory requirement of "sufficient security," and (2) that it was negligent to make the deposit in an out-of-the-state bank where the guardian couldn't keep in constant touch with the bank's condition. This latter point was overruled in the case of *Moore v. Eure.*[73] A North Carolina executrix died, leaving estate funds deposited in a Virginia bank. The administrator *de bonis non,* a Virginia resident, continued the deposit and added to it, after having transferred it into his name as administrator. The bank failed, and the administrator was not held liable, some weight being attached to the fact that both he and his firm kept their own funds in the same bank.

In *State* ex rel. *Roebuck v. National Surety Co.,*[74] a bank was appointed guardian and deposited the ward's funds with itself, setting up an account in its guardianship name. Upon its failure, it was held liable because it had failed to invest the funds, and because it had intermingled the funds with its own, and thereby converted them. Later cases[75] refer to the doctrine of that case, and yet give no inkling as to which of the two reasons given was relied upon. Again, no mention was made of the statutory requirement of security, which was, however, relied upon in the latter case of *State* ex rel. *Bane v. Nicholson,*[76] where the guardian, with admitted good faith, deposited the entire estate in a six-percent savings account.

The Court in this last case[77] apparently approves a temporary deposit, while the funds are awaiting investment or are needed for current use. This point is reaffirmed in *Marriner v. Mizzelle,*[78] qualified by the familiar requirements of good faith and diligence. But again, the Court takes pains to indicate that a deposit for a fixed period is a loan without security, and improper.

[72] 97 N. C. 186, 1 S. E. 653 (1887).
[73] 101 N. C. 11, 7 S. E. 471 (1888).
[74] 200 N. C. 196, 156 S. E. 531 (1930).
[75] State *ex rel.* Quinton v. Cain, 203 N. C. 162, 165 S. E. 543 (1932); *In re* Home Savings Bk., 204 N. C. 454, 168 S. E. 688 (1933).

If the Court relied upon the mingling feature, it seems that it did so in disregard of actual banking practice. Furthermore, when the bank received the money after the account was set up, it did so in its capacity as depository, not as guardian. It therefore could treat it as if it had been deposited by an outside fiduciary. See Whitmore, *Self-Deposit by Trust Companies of Fiduciary Funds* (1934) 12 N. C. L. Rev. 350.

[76] 203 N. C. 104, 164 S. E. 750 (1932).
[77] *Id.* at 106, 164 S. E. at 751.
[78] 207 N. C. 34, 175 S. E. 711 (1934).

Whether or not the Court would adhere to the requirement of security for bank deposits in the case of any but guardians, (as seemed to be the conclusion to be drawn from the cases involving loans on personal security), is not clear. At least the fiduciary other than guardians would be wise to avoid depositing estate moneys in a bank except temporarily.

Advice of the Court:

One safe procedure is open to the trustee who is at loss to know his powers and the proper move to make. He may petition the court for advice and instructions. The Supreme Court has repeatedly referred to the equity jurisdiction of the Superior Court to entertain such proceedings.[79] And the protection afforded the trustee is apparently complete. A *dictum* in the *Sheets Case*[80] states that if the investment was made pursuant to an order of the court, the trustee cannot be held liable for any loss resulting therefrom, in the absence of fraud or gross negligence—the same protection offered the trustee who invests within the statutory lists. Not only that, but, according to the early case of *Washington v. Emery,*[81] if he *fails* to obtain such a court order and acts on his own initiative, "he takes upon himself the *onus* of proving entire *bona fides,* and that under the circumstances there was reasonable ground to believe that the fund would be benefited." The end is worthy of the means.

Apparently a trustee is equally protected who reports his investment to the court and has his account approved.[82] This course, however, contains the obvious pitfall of non-approval, and, in at least one case,[83] the wisdom of the investment was permitted to be raised even after such approval.

The wisdom of permitting a trustee to pass the investment buck to the courts is questionable. The subject of investments is one of the most highly technical fields in modern economics. It is a subject about which the average judge has relatively little personal knowledge. It is a subject which requires years of study before the data, upon which intelligent decisions must be made, can even be understood. It is submitted that a court could hardly be asked to consider a more complex

[79] See, for instance, Commercial Nat. Bk. v. Alexander, 188 N. C. 667, 125 S. E. 385 (1924) and Wachovia Bk. & Tr. Co. v. Edwards, 193 N. C. 118, 136 S. E. 342 (1927). But *cf.* Gary v. Cannon, 38 N. C. 64, 69 (1843), where the Court says: "The Court . . . never undertakes to dictate to whom a guardian shall lend money, nor how long he shall lend it to a particular person. The investments are in the guardian's discretion, as they are upon his responsibility."
McIntosh, North Carolina Practice and Procedure (1929) §69.

[80] 195 N. C. 149, 154, 141 S. E. 355, 358 (1928).

[81] 57 N. C. 32 (1858).

[82] See State *ex rel.* Collins v. Gooch, 97 N. C. 186, 190, 1 S. E. 653, 656 (1887).

[83] Pierce v. Pierce, 197 N. C. 348, 148 S. E. 438 (1929), *supra (Bank Deposits).*

set of evidence than *should* be presented to him if he is to give the advice that the interests of the beneficiary deserves. Why then should an already overworked judiciary be shouldered with the responsibility of giving such advice? If the proceeding is handled summarily, as it needs must be in many, if not most, cases, nothing but blame can be expected for our judicial system. Should the courts be burdened with the responsibility of advising trustees as to investments any more than they should have to assume such responsibility as to insurance companies, banks, or public funds? The answer seems clear enough.

General Considerations in Managing the Estate

The material under this heading, while not strictly involving the problem of *investing* trust funds, is so closely connected with that subject that it deserves at least passing mention.

The power of a fiduciary to *retain* investments turned over to him as part of the estate, to *exchange* investments, and to *liquidate* improper or doubtful investments, is undoubtedly tested by the same general standard that is so steadfastly applied in the case of initial investment or reinvestment.[84] The assets of the estate must be watched constantly for changes detrimental to the interests of the beneficiaries.

The estate funds must never be mingled with the trustee's own or other moneys.[85] They must be kept separate and intact, and the trustee should make no move which can raise even a suspicion that he is using the estate for his own purposes.[86]

Title to the funds must always be kept openly in the name of the estate, or in the name of the trustee as representative of the estate.[87] As appeared in the cases involving bank deposits, even though the estate is kept separate from other funds, if it stands in the name of the trustee individually, he is deemed to have converted the funds.

[84] No North Carolina cases have been found dealing directly with the retention of investments. On exchange, see Christman v. Wright, 38 N. C. 549, 553 (1845). Many of the cases discussed *supra* involve exchanges, particularly those under *Confederate Securities and Currency,* and *Loans on Personal Security.* Cases cited in note 51 specifically deal with the liquidation aspect.

For general discussions, see Notes (1927) 4 Wis. L. Rev. 111; (1930) 30 Col. L. Rev. 1166; (1930) 79 U. of Pa. L. Rev. 77; (1933) 19 Va. L. Rev. 630; 3 Bogert, *op. cit. supra* note 1, §683 *et seq.*; McKinney, *op. cit. supra* note 1, at 32; 1 Restatement, Trusts (1935) §§227-231.

[85] See State *ex rel.* Cummings v. Mebane, 63 N. C. 315 (1869); Shipp v. Hettrick, 63 N. C. 329 (1869); Winstead v. Stanfield, 68 N. C. 40 (1873); State *ex rel.* Wells v. Sluder, 70 N. C. 55 (1874); State *ex rel.* Lippard v. Roseman, 72 N. C. 427 (1875); Burke v. Turner, 85 N. C. 500 (1881); Dunn v. Dunn, 137 N. C. 533, 50 S. E. 212 (1905); Duffie v. Williams, 148 N. C. 530, 62 S. E. 611 (1908); State *ex rel.* Roebuck v. National Surety Co., 200 N. C. 196, 156 S. E. 531 (1930); 3 Bogert, *op. cit. supra* note 1, §§596, 612; McKinney, *op. cit. supra* note 1, at 24. *Cf.* Whitmore, *supra* note 75.

[86] See cases cited note 65; 3 Bogert, *op. cit. supra* note 1, §612; McKinney, *op. cit. supra* note 1, at 23.

[87] See cases cited note 58.

The trustee is not permitted to represent his own interests on the one hand, and those of the estate on the other. In the case of *Tayloe v. Tayloe*,[88] an administrator received as part of the estate a $1000 share of stock in a school. The stock had no market value, and, having been ordered to sell by the court, he offered it at public sale, and, thinking it worthless, bid it in himself for $103. It was admitted that he acted in entire good faith. When it later appeared that the stock might have been redeemed for its face value, the administrator was held liable for that amount. The Court said that an administrator may not purchase for himself, even though he acts in good faith, fairly, and pays a fair price.

One further illustration of the business judgment demanded of a fiduciary may be of interest. An executor held a judgment for $252 as part of the estate. He was approached by the judgment debtor's son, who offered to compromise the judgment. The executor stated that he had no power to make such a compromise. The judgment was sold at public auction, and brought $1. It was later compromised by the purchaser for $150, and the executor was held liable for the difference. (It is true that other dealings of the executor exhibited a want of good faith, and the Court was unquestionably influenced by that showing.)[89]

Conclusions

It would help greatly if, on the basis of these helter-skelter statutes and decisions, the North Carolina law of trust investments could, in the light of experience, be overhauled and comprehensively codified. But, at best, that would go only part of the way.

In the hands of the better trust companies, broad and discretionary powers over trust investments can be safely and effectively exercised. The specialized knowledge and experience of their investment officers, and their continuity of administration, may be expected to develop standards which no body of law can establish. For the protection of clients of the weaker companies, stricter inspections of investment practices by state and national bank examiners may be necessary.

The position of the individual, non-professional trustee calls loudest for change. The family lawyer or other confidant cannot command the requisite technical skill in investment matters.

For those settlors who do not desire to leave the carrying out of their trusts to the better trust companies, the state should set up a Public

[88] 108 N. C. 69, 12 S. E. 836 (1891).

[89] Summers v. Reynolds, 95 N. C. 404 (1886). See also Grant v. Reese, 94 N. C. 720 (1886), where an administrator was held liable for selling a judgment, obtained by him against a solvent estate, for about half its amount.

Trustee. Some of the Australasian states have had such an office for more than fifty years; England, since 1908. Mr. Gilbert Stephenson, who has best described the work of the Public Trustee in England,[90] thinks such an institution is not needed in any of the United States, but his judgment is affected by his natural enthusiasm for the services rendered by the better type of American trust company. The chaotic and precarious condition of individual trustee administration in this country, however, makes the establishment of some such agency inevitable.

[90] ENGLISH EXECUTOR AND TRUSTEE BUSINESS (1930) 52-84; reviewed in (1931) 9 N. C. L. REV. 488.